BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

BEAULAH ANN SLONIGER Claimant	)	
V.	)	
JEFFERSON COUNTY Respondent	)	Docket No. 1,071,976
AND	)	
KANSAS WORKERS RISK COOPERATIVE FOR COUNTIES Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent), through Ronald J. Laskowski, appealed Administrative Law Judge Steven J. Howard's April 7, 2016 preliminary hearing Order. John J. Bryan appeared for claimant.

The record on appeal is the same as that considered by the judge.

ISSUES

Claimant injured her knee at work on September 20, 2014. The court-ordered physician indicated claimant needed a right total knee arthroscopy (TKA). Respondent questioned if claimant's need for a TKA was due to her preexisting arthritis and not her work accident. The judge ruled, *inter alia*, the court-ordered doctor was still authorized to provide claimant treatment, including a TKA.

Respondent argues claimant did not sustain an accidental knee injury arising out of and in the course of her employment, including that her accident was not the prevailing factor in her medical condition and disability. Rather, respondent contends claimant needs a TKA because of her preexisting arthritis. Respondent argues claimant failed to advise medical providers that she made knee complaints approximately eight months before her accident. Respondent further asserts claimant's injury was solely an aggravation of a preexisting arthritic knee condition.

Claimant argues respondent is simply challenging the judge's award of medical treatment, which is not an appealable issue from a preliminary hearing. Further, claimant argues it is respondent's duty to prove any affirmative defenses, including whether her need for a TKA is due to her preexisting arthritis and not her work accident.

The issues are:

1. Does the Board have jurisdiction to hear respondent's appeal?

2. Did claimant sustain an accidental injury arising out of and in the course of her employment?

A. Did claimant's injury solely aggravate, accelerate or exacerbate a preexisting condition or render a preexisting condition symptomatic?

B. Was claimant's accident the prevailing factor in causing her injury, medical condition and disability?

FINDINGS OF FACT

Claimant, currently 70 years old, is a jailer at the Jefferson County correctional facility. She alleged a September 20, 2014 right knee and left shoulder injury[1] in which she fell after stepping on a round cylinder lock that was inadvertently on the floor. Her right knee struck the floor. She had severe right knee pain and conservative treatment thereafter. All references to claimant's knee or leg concern her right knee or leg.

On November 26, 2014, claimant was evaluated at respondent's request by Chris D. Fevurly, M.D., who is board certified in internal medicine, occupational medicine and as an independent medical examiner. Dr. Fevurly noted claimant was working in a sit-down job for respondent and was dependent on a walker because she could not bear weight on her leg. Claimant denied prior leg problems and Dr. Fevurly, who found her to be a good historian, noted no preexisting history of significant medical conditions. The doctor's physical examination showed claimant had restricted knee range of motion with severe pain, a markedly antalgic gait and an inability to walk any prolonged distance. Dr. Fevurly was concerned claimant had a microfracture of the tibial plateau. The doctor opined the prevailing factor for claimant's pain was her injury by accident. He suggested an orthopedic evaluation.

Claimant was evaluated by Thomas S. Samuelson, M.D., an orthopedic physician, on March 9, 2015. Dr. Samuelson noted claimant did not have any specific locking up of her knee. Dr. Samuelson diagnosed claimant as having a knee contusion that aggravated underlying degenerative joint disease that was not caused by her accident. The doctor stated claimant's knee had significantly improved, did not require much significant treatment and any treatment for arthritis should be conducted under her regular insurance.

[1] The compensability of claimant's left shoulder is not germane to this appeal.

Claimant was dissatisfied with Dr. Samuelson. The parties entered an Agreed Order signed by Judge Howard on June 3, 2015, authorizing Daniel J. Stechschulte, M.D., a board certified orthopedic surgeon, as claimant's authorized treating physician.

Dr. Stechschulte evaluated claimant on June 4, 2015. Claimant had an antalgic gait and used a walker. She complained of knee pain and that her knee had locked up on her three times. As claimant had done with Dr. Fevurly, she denied prior knee complaints to Dr. Stechschulte.

Dr. Stechschulte reviewed knee MRI films taken on October 27, 2014. He interpreted the MRI as showing multiple loose bodies, an ACL strain and a medial meniscal tear, and agreed with a radiologist's notation of mild patellofemoral chondromalacia. A knee x-ray showed severe loss of joint space laterally and mild loss of joint space patellofemorally, but did not show loose bodies. Dr. Stechschulte diagnosed claimant with a probable medial meniscal tear, multiple loose bodies, an ACL strain and exacerbation of degenerative joint disease. He noted the prevailing factor for claimant's knee complaints was her work injury and she would need knee surgery.

On July 14, 2015, claimant was seen by Dr. Stechschulte for a follow-up appointment. The doctor reviewed an x-ray report from September 30, 2014 (10 days post-injury) showing mild to moderate loss of joint space laterally and mild loss of joint space patellofemorally. Dr. Stechschulte noted there was "notable progress of [claimant's] arthritis from the time of injury to her initial evaluation with us on 06/04/15."[2] Dr. Stechschulte's diagnoses remained the same, but instead of saying claimant had an exacerbation of degenerative joint disease, he indicated claimant had "significant progression of DJD, permanent exacerbation."[3] Dr. Stechschulte's prevailing factor opinion remained the same. Claimant agreed to a knee arthroscopy. Dr. Stechschulte added, "However, given the progression of her arthritis from the time of her injury she will likely ultimately require a R TKA in the future."[4]

Dr. Stechschulte operated on claimant's knee on September 30, 2015, consisting of an arthroscopy, repair of an ACL tear, removal of a loose body in claimant's ACL, partial lateral and medial meniscectomies and chondroplasties. The doctor noted claimant had grade III and IV degenerative arthritis that was progressive based on her x-rays.

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[2] P.H. Trans. (Apr. 5, 2016), Cl. Ex. 1 at 11. "Progress," in this context, is a worsening.

[3] *Id.*

[4] *Id.*

Claimant felt better when Dr. Stechschulte saw her on October 8, 2015, but her leg felt weak and she needed a wheelchair or a walker. On November 12, 2015, claimant told Dr. Stechschulte she was getting worse. The doctor noted claimant's preexisting degenerative joint disease was permanently exacerbated. X-rays showed she had severe, "bone on bone" loss of joint space laterally with mild loss of joint space patellofemorally with "significant progression noted since first films provided from near time of injury."[5]

Dr. Fevurly prepared a January 18, 2016 letter at respondent's attorney's request. The doctor noted claimant's previous denial to him of prior knee complaints was inconsistent with knee complaints she made to Darrin Cox, PA-C, on January 24, 2014. She was seen by Mr. Cox for unrelated and irrelevant personal health conditions, but her review of systems included bilateral knee pain. On Mr. Cox's examination, claimant had knee pain and tenderness with crepitation on range of motion. Dr. Fevurly noted claimant's complaints to Mr. Cox were likely consistent with degenerative arthritis and the prevailing factor in claimant's need for medical treatment, including a TKA, was her preexisting degenerative arthritis, not her work accident. It appears no doctor involved in this case reviewed Mr. Cox's report before Dr. Fevurly's mention of such report in his letter.

In an undated letter, Mr. Cox stated claimant's January 24, 2014 evaluation did not concern a gait disturbance, which he only observed after her work accident.

Respondent appealed the judge's Order, which states:

> [C]laimant may be experiencing bone on bone difficulties with her right knee at this time. However, it is clear under the holding of Nam Le supra that the prevailing factor and claimant's need for medical was related to the injury and fall she sustained on September 20, 2014. Further, the fact that claimant may have had underlying condition which was aggravated, does not lessen her entitlements to benefits under the Kansas Workers Compensation Act where the accident was the prevailing factor and the need for medical care.[6]

PRINCIPLES OF LAW

Claimant carries the burden of proving her right to an award of compensation based on the whole record using a "preponderance of the credible evidence" and a "more probably true than not true" standard.[7] Whether an accident arises out of and in the course of the worker's employment depends on the facts.[8]

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[5] *Id.*, Cl. Ex. 1 at 6.

[6] ALJ Order at 4.

[7] K.S.A. 2014 Supp. 44-501b(c) & K.S.A. 2014 Supp. 44-508(h).

[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

K.S.A. 2014 Supp. 44-508 states, in pertinent part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.
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> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is reviewable. Under K.S.A. 2014 Supp. 44-551 and K.S.A. 2014 Supp. 44-534a, the Board can review allegations that an administrative law judge exceeded his or her jurisdiction, including: (1) whether the worker sustained an accident, repetitive trauma or resulting injury; (2) whether the injury arose out of and in the course of employment; (3) whether the worker provided timely notice; and, (4) whether certain defenses apply. "Certain defenses" refer to defenses which go to the compensability of the injury under the Workers Compensation Act.[9]

ANALYSIS

1. The Board has jurisdiction to hear respondent's appeal.

The Board generally does not entertain appeals concerning a judge's preliminary order concerning medical treatment. However, this matter involves whether claimant's injury was solely an aggravation of a preexisting condition and whether her accident was the prevailing factor in causing her injury, medical condition and disability. These are appealable issues.

Whether an accident occurred is appealable. According to K.S.A. 2014 Supp. 44-508(d), the definition of "accident" mandates that the accident be the "prevailing factor" in causing the injury. Whether an accident arose out of employment is appealable. Pursuant to K.S.A. 2014 Supp. 44-508(f)(2)(B)(ii), an injury by accident arises out of employment only if the accident is the "prevailing factor" in causing the injury, medical condition and resulting disability or impairment. The prevailing factor issue is a necessary component of "arising out of."[10]

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[9] See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 674, 994 P.2d 641 (1999).

[10] See *Kornmesser v. State*, No. 1,057,774, 2013 WL 3368484 (Kan. WCAB June 14, 2013); and *Berkley Frye v. Angmar Medical Holdings, Inc.*, Nos. 1,059,923 & 1,059,925, 2012 WL 6101123 (Kan. WCAB Nov. 30 2012); and *Shaffer v. Matcor Metal Fabrication, Inc.*, No. 1,058,166, 2012 WL 5461470 (Kan. WCAB Oct. 10, 2012).

Respondent's arguments concerning prevailing factor present an appealable issue from a preliminary hearing order. Moreover, respondent's other argument regarding whether claimant's injury was solely an aggravation, acceleration or exacerbation of a preexisting condition or rendered a preexisting condition symptomatic goes toward compensability, the heart of "certain defenses."

2. Claimant sustained an injury by accident which arose out of and in the course of her employment.

Le[11] does not hold that an injured worker who sustains what is solely an aggravation of a preexisting condition is nonetheless entitled to compensation if the accident is the prevailing factor in the worker's injury, medical condition or disability. Instead, *Le* states a worker must prove more than a sole aggravation *and* also prove the prevailing factor requirement.

In *Le*, two of three physicians indicated Ms. Le's pain and disability were due to her work accident and not her preexisting osteoporosis. The Court of Appeals indicated the Board erred in concluding that the remaining physician's contrary opinion was substantial evidence to support a finding Ms. Le's ongoing pain that kept her from working was due to her osteoporosis and not her accidental work injury.

Here, claimant's injury was not solely an aggravation, acceleration or exacerbation of a preexisting condition or rendered a preexisting condition symptomatic. K.S.A. 44-508(f)(2) does not bar compensability for *any* aggravation of a preexisting condition. The Kansas Workers Compensation Act does not define the term, but "solely" has been judicially defined as "singly" or "[e]xclusively."[12] Therefore, if claimant has an injury above and beyond a sole aggravation of her preexisting condition, such as a new physical injury, the statute does not bar compensability.[13] An increase in symptoms without a new diagnosis is not proof of a change in the physical structure of the body.[14] In this case, claimant had menisci tears above and beyond an exacerbation of her preexisting arthritis or degenerative joint disease. Therefore, her injury was more than solely an aggravation, acceleration or exacerbation of a preexisting condition.

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[11] *Le v. Armour Eckrich Meats*, 52 Kan. App. 2d ___, 364 P.3d 571, *rev denied* ___ Kan. ___ (2015).

[12] *Poull v. Affinitas Kansas, Inc.*, No. 102,700, 2010 WL 1462763 (Kansas Court of Appeals unpublished opinion dated Apr. 8, 2010).

[13] See *Krueger v. Kwik Shop, Inc.*, No. 113,418, 2016 WL 852938 (Kansas Court of Appeals unpublished opinion filed Mar. 4, 2016) (two of three doctors, including a court-ordered neutral doctor, found claimant had no new injury and solely had an aggravation of a preexisting condition) and *Le, supra,* and the cases cited therein. See also *Sowers v. Kingman Community Hospital*, No. 1,065,624, 2016 WL 858316 (Kan. WCAB Feb. 22, 2016).

[14] See *Krueger v. Kwik Shop, Inc.* No. 1,062,995, 2015 WL 996896 (Kan. WCAB Feb. 27, 2015).

Claimant also proved the prevailing factor requirement. Her accident was the prevailing factor in her injury, medical condition and disability. The fact claimant failed to tell evaluating doctors about her January 24, 2014 evaluation with Mr. Cox, for an unrelated health issue, in which she also mentioned knee pain, is of some, but questionable significance. Claimant's primary diagnoses at the time were for unrelated health issues, but she was also diagnosed with knee pain. Claimant's September 20, 2014 injury by accident resulted in a markedly different condition, including menisci tears, in addition to rendering her unable to ambulate significant distances and relegating her to sit-down work only.

Dr. Stechschulte, the court-ordered physician, who was selected by the parties, opined in two of his reports that the primary and prevailing factor for claimant's knee complaints was her accidental work injury. In the second such report, the doctor indicated claimant would likely need a TKA due to the notable progression of her arthritis from the time of her injury.

Dr. Fevurly's opinion that the prevailing factor in claimant's need for medical treatment is preexisting arthritis is not as convincing as the opinion of Dr. Stechschulte, a board certified orthopedic physician. Dr. Samuelson's opinion is discounted largely because he was unable to identify the injuries found and operated on by Dr. Stechschulte.

Respondent cites several Board cases denying compensability in cases involving total knee replacement surgeries where a worker had preexisting knee arthritis. These cases are fact-driven and depend on the specific evidence adduced in each case. For instance, in *Berkley-Frye*[15] the worker injured her knee and had a total knee replacement. The treating doctor testified Ms. Berkley-Frye's accident resulted in an aggravation of her underlying degenerative disease/osteoarthritis and the prevailing factor in her need for a total knee replacement was her preexisting arthritis, not her accident. A single Board Member ruled Ms. Berkley-Frye solely had an aggravation of a preexisting condition and her accident was not the prevailing factor in her injury and medical condition.

Dempsey[16] involved a worker who struck her knees. She had arthroscopic surgery, a partial meniscectomy, a partial synovectomy, chondroplasty of the patellofemoral joint and debridement and several left knee aspirations. Subsequently, an MRI revealed significant degenerative changes in Ms. Dempsey's left knee. Her treating doctor indicated Ms. Dempsey needed a total knee replacement. Her doctor stated Ms. Dempsey's injury made her previously asymptomatic knee arthritis worse and the prevailing factor in her need for surgery was her preexisting condition, with her injury only contributing to and

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[15] *Berkley-Frye, supra*.

[16] *Dempsey v. Saint Raphael Nursing Services, Inc.*, No. 1,065,128, 2014 WL 3055458 (Kan. WCAB June 23, 2014).

speeding up her needing the surgery earlier in life. The doctor later opined the accident was the prevailing factor because her asymptomatic arthritis was made symptomatic because of her fall. The judge denied compensability for the total knee surgery, finding Ms. Dempsey's injury solely rendered a preexisting condition symptomatic, without ruling on the prevailing factor requirement. A single Board Member affirmed.

In *Moore*,[17] a worker struck his knee on concrete. The treating doctor stated claimant's accident resulted in him aggravating his preexisting osteoarthritis. The treating doctor noted the prevailing factor in Mr. Moore's symptoms and need for treatment was his preexisting osteoarthritis, not his work accident. A single Board Member concluded Mr. Moore's injury was solely an aggravation of a preexisting condition and rendered the preexisting condition symptomatic, thus not compensable.

Kornmesser[18] was a decision entered by the entire Board. Ms. Kornmesser injured her knee when she stepped in a hole while running at work. Her employer accepted as compensable menisci tears and she had surgery for the same. Thereafter, she sought additional treatment, including a TKA. Three doctors provided expert opinions. The treating doctor indicated claimant had very significant preexisting arthritis and treatment should be paid under Ms. Kornmesser's private insurance. Ms. Kornmesser's hired medical expert opined her accident aggravated and accelerated her asymptomatic, preexisting arthritis and her need for a TKA. The court-ordered physician concluded Ms. Kornmesser had significant degenerative joint disease and her injury aggravated such condition, but her need for additional treatment was due to her preexisting arthritis, not the work accident. The judge placed more evidentiary weight in the opinions of the treating and court-ordered physicians. The judge denied Ms. Kornmesser's request for treatment of her arthritic condition. The Board agreed Ms. Kornmesser's accident was not the prevailing factor in her medical condition or disability, including her need for additional treatment. For reasons cited by the judge, the Board agreed the opinion of Ms. Kornmesser's hired medical expert was not as credible as the treating and court-ordered doctors' opinions.

The instant case differs from the above-noted cases. Here, claimant proved more than a sole aggravation or rendering of an asymptomatic condition symptomatic and met the prevailing factor requirement. *Dempsey* is most similar, but the treating doctor in that case provided conflicting evidence regarding Ms. Dempsey's preexisting arthritis being the prevailing factor for her injury and medical condition. Cases like *Krueger*, *Le* and *Kornmesser* demonstrate that determining whether there is solely an aggravation or whether the prevailing factor requirement is met depend on the particular facts and, to a large degree, the medical evidence specific to the case. Here, unlike in the other cases, the more credible evidence points to compensability.

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[17] *Moore v. Jackson Farmers, Inc.*, No. 1,071,835, 2015 WL 996905 (Kan. WCAB Feb. 27, 2015).

[18] *Kornmesser v. State*, No. 1,057,774, 2015 WL 2169348 (Kan. WCAB Apr. 2, 2015).

CONCLUSIONS

Based on the current evidence, claimant proved she sustained an injury by accident arising out of and in the course of her employment, her injury was not solely an aggravation, acceleration or exacerbation of a preexisting condition or rendered a preexisting condition symptomatic, and her work accident was the prevailing factor in her injury, disability and medical condition.

WHEREFORE, the undersigned Board Member affirms the April 7, 2016 preliminary hearing Order based on the facts specific to this case and largely due to the opinion of the court-ordered physician.[19]

IT IS SO ORDERED.

Dated this ____ day of June, 2016.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Honorable Steven J. Howard, Administrative Law Judge

[19] By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.